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No. 99-1361

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ELIZABETH CAPROTTI,

Petitioner,

v.

TOWN OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF OF *AMICI CURIAE* NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS AND ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The *Amici Curiae* — The New York State Conference of Mayors and Municipal Officials and The Association of Towns of the State of New York (jointly the "Amici") — represent approximately 1400 units of local government in New York State. These local governments comprise almost every village, town, and city in New York State. The specific interest of each Amici is as follows:

1. The New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit voluntary membership association consisting of 556 of the State's 620 cities and villages, thereby representing the majority of such municipalities. NYCOM provides ongoing education, information and training to village and city officials in all aspects of the cable franchising regulatory process.

2. The Association of Towns of the State of New York is a not-for-profit voluntary membership association established in 1933 by town officials. From its inception, membership support has been strong and has grown to over 97% of New York State's 932 towns. Thus, our membership includes local governments that have been delegated franchising authority pursuant to the Cable Television Consumer Protection and Competition Act of 1992. The Association provides ongoing education, information and training to town officials in all aspects of the cable franchising regulatory process.

A town in New York State is a general purpose, home rule municipal corporation. New York State has 932 statutorily created towns covering the entire area of the State (outside of cities). Towns are the most numerous and diverse

class of local government within New York State. The 1990 census of town populations ranged from 47 in Montague to approximately 716,000 in Hempstead. Towns vary in their physical characteristics, their constituencies, and the services they provide. At the same time, all towns are similar in their basic governmental structures and responsibilities.

Like the Respondent, the Amici firmly believe that the ruling of the New York State Court of Appeals should stand and that New York's municipalities, as the franchising authorities for cable operators, should be immune from state tort claims. The federal statute is clear in its intent and scope and thus protects municipalities from claims such as the petitioner's third-party claim for defamation. As illustrated below, the Amici submit this brief to show the detrimental impact that municipalities will suffer if they are required to censor private parties who seek access to the many public, educational, and government channels contained in the majority of franchise agreements. Subjecting these franchising authorities to monetary damage claims would frustrate Congress's intent.

SUMMARY OF THE ARGUMENT

Certiorari should not be granted in this case because the Court has no issue that is ripe for adjudication. Every court in New York State has determined that the petitioner was afforded every legal remedy available to her under the Cable Television Consumer Protection and Competition Act of 1992. Unsatisfied, petitioner is seeking further judicial redress to have this Court create a new and additional remedy.

Congress provided petitioner with injunctive and declaratory relief regarding any dispute she may have with the municipal cable franchising authority. 47 U.S.C. § 555a. The purpose of providing injunctive relief against a local franchising authority is to afford petitioner a judicial remedy to have the programmer's show removed from the public access channel. Congress expressly and unmistakably intended to insulate local franchising authorities from costly monetary damages. Moreover, Congress provided petitioner with compensatory relief against the cable programmer. 47 U.S.C. § 558. Congress recognized that the cable programmer should be monetarily responsible for any damages resulting from the content of his program — not the local franchising authority. Essentially, petitioner seeks to have this Court supplant the Congressional intent for her own gains by seeking monetary relief from the taxpayers.

The respondent's actions amounted to and arose from the regulation of cable service. Establishing rules and regulations for the use of public access channels includes the determination whether to broadcast a particular program. Thus the plain and ordinary meaning of the word "regulation" must include channel access decisions. Furthermore, Congress clearly and unmistakably chose to immunize franchising authorities from costly monetary damages in order to preserve the public's access to the electronic soapbox. Congress recognized that First Amendment issues arise when governmental entities regulate the content of free speech.

Finally, Congress's intent to preempt petitioner's claim for monetary damages against the local franchising authority is clear. Congress expressly provided petitioner with

injunctive and declaratory relief against the local franchise authority. Congressional intent is the "touch stone" of preemption analysis. Congress chose to convey its intent in the clearest form of preemption — a preemption clause. Moreover, Congress used the plainest words possible. Finally, Congress could have chosen to preserve petitioner's state common law claim against respondent in the savings clause 47 U.S.C. § 556 — but it did not. Furthermore, every court that has been called to determine the scope of the preemption clause has concluded that the only relief against a local franchising authority is injunctive and declaratory. Thus this court should not grant petitioner's request for certiorari because there is no issue to resolve.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE MUNICIPALITIES, AS CABLE FRANCHISING AUTHORITIES, ARE IMMUNIZED FROM THIRD-PARTY STATE LAW CLAIMS SUCH AS DEFAMATION.

A. *Given the plain meaning of 47 U.S.C. § 555a, the municipality regulated cable service within the meaning of the Act even when it declined to remove a private citizen's broadcast from its public access channel.*

In New York, local municipalities act as the franchising authorities for cable operators and thus their authority consists of "a set of statutory and regulatory laws specifying what cable operators are allowed to do." *Glendora v. Kofalt*, 162 Misc. 2d 166, 174, 616 N.Y.S.2d 138, 144 (Sup. Ct. Westchester County 1994). To determine what Congress

intended when it limited claims against franchising authorities, this Court need not explore the legislative history of the statute when the statutory language is clear on its face. *See Ratzlaf v. United States*, 510 U.S. 135, 147-8 (1994). When the written words are easily understood, the Court should not seek to create an ambiguity. *Barnhill v. Johnson*, 503 U.S. 393 (1992); *Coplin v. Fairfield Public Access Television Comm.*, 111 F.3d 1395, 1403 (8th Cir. 1997). The Court should presume that the legislature set forth its intentions and thus no other interpretations of the language need to be read into the printed words. *See United States v. Union Elec. Co.*, 64 F.3d 1152, 1165 (8th Cir. 1995).

The relevant portion of Section 24 of the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter the 1992 Cable Act) states:

> In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental entity . . . arising from the regulation of cable service . . . any relief, to the extent such relief is required by any other provision of Federal, State, or local law, shall be limited to injunctive or declaratory relief.

47 U.S.C. § 555a(a) (1994).

Thus franchising authorities are immunized from any liability for damages arising from their regulation of cable service. Aggrieved parties may seek either declaratory or injunctive relief, but may not pursue monetary damages. Although petitioner takes issue with the phrase "arising from the regulation of cable services," franchising authorities

regulate cable services by their very nature when they establish a franchise agreement with a cable operator setting forth the terms and conditions of the franchise.

The term "regulation of cable services" has been found to be clear and not unconstitutionally vague. *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir. 1996). In *Jones*, the court interpreted, inter alia, whether the city had regulated cable services when it declined to allow the plaintiff to install more cable infrastructure and to service customers without a city-wide franchise. 80 F.3d at 324. The court noted that the term "regulation of cable services" was clear. *Id.* at n.3. People of ordinary intelligence would not have to guess at the meaning of the phrase. *See Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). Like the city of Chula Vista, the Town of Woodstock "regulated cable service" when it created a committee to establish rules governing the use of the PEG channels. Whether the petitioner agreed with the manner in which the rules were applied is a separate issue that should not be addressed by this court. The fact remains that the Town clearly regulated cable services within the meaning of 47 U.S.C. § 555a.

Even if the Court finds that the term "regulation of cable service" is unclear, the legislative history of this statute amply demonstrates that Congress sought to protect local governments, as the franchising authorities, from monetary damage claims, including defamation claims, brought by third parties. The Cable Communications Policy Act of 1984 (codified at 47 U.S.C. §§ 521-559 (1994) (hereinafter 1984 Cable Act) allowed franchising authorities to require "channel capacity be designated for public, educational, or governmental use," and to "require rules and procedures for the use of such channel capacity." 47 U.S.C. § 531(b)(1994). Cable operators

were required to provide PEG channels to municipalities in exchange for franchising authorities granting cable operators the ability to proceed in the municipal right-of-way. One purpose of the 1984 Cable Act was to guarantee diversity of information sources and services to the public. H.R. Rep. No. 98-934, at 30 (1984). Congress envisioned public access channels as

> the video equivalent of the speaker's soap box or the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. No. 984, 98th Cong., 2d Sess. at 30, 45 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (explaining statutory definition of PEG access). With the increased access, however, came an increased use of public access channels to also promote hate speech and indecent material. *See Missouri Knights of the Klu Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1349 (W.D. Mo. 1989). In response, Congress further regulated the cable industry and readdressed cable access in the 1992 Cable Act. The 1992 Cable Act protects municipal franchising authorities from lawsuits stemming from cable operators and also from cable programmers. A logical extension of this provision is to protect franchising authorities from state law claims made by third-parties who have ample recourse to pursue their claims directly against the individual who may have caused the harm.

B. *Immunizing franchising authorities from state law claims does not violate the First Amendment because PEG channels are akin to a public forum and thus franchising authorities may not regulate the content of speech on these channels.*

The constitutional protections of freedom of speech "protects the individual against actions by governmental authorities, not by private persons." *Glendora*, 162 Misc. 2d at 173. Because Congress intended public access channels to be used for free speech purposes, the PEG channels are open to all speakers and are akin to any other public forum in a municipality. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Once an open forum is created, the government cannot pick and choose speakers based upon the content of the speaker's ideas.

Requiring a franchise authority to censor the content of programming on public access channels such as the petitioner urges, would subject a franchise authority to unlimited actions alleging First Amendment violations both by those who seek to be on the air and by those who disagree with the messages broadcast. *See McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161, 165 (2d Cir. 1998). Courts have already held that protecting less marketable speakers' access on a cable system is an important governmental interest and that the PEG provisions are compatible with that interest. *See Daniels Cablevision Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993).

When the Cable Act of 1992 was passed, cable operators complained that their First Amendment rights were abridged because the operators lacked editorial control over the content of programming on leased access and PEG channels. *Daniels*

Cablevision, 835 F. Supp. at 11. Although the *Daniels* case involved complaints by cable operators over the "must-carry" provisions of the 1992 Cable Act, the minor restriction on the operators' First Amendment rights expanded citizens' ability to exercise their First Amendment rights through a more open forum in which to speak. By forbidding cable operators to have editorial control, Congress effectively made operators into information conduits. Franchising authorities, like the cable operators, also merely act as a conduit for the speech of unrelated parties. Thus franchising authorities should be treated more akin to internet service providers who are not considered publishers of material. 47 U.S.C. § 230(c)(1); *see Blumentahl v. Drudge*, 992 F. Supp. 44, 49-52 (D.D.C. 1998); *Zeran v. America Online*, 129 F.3d 327, 331-32 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding that knowledge of defamatory content on internet is not sufficient to subject ISPs to liability).

Granting immunity to franchising authorities for state claims arising out of the regulation of cable service is both compelling and narrowly tailored to meet the government's interest in promoting a municipality's ability to provide for a free and open marketplace of ideas through the use of its PEG channels. Thus 47 U.S.C. § 555a is narrowly tailored to prevent municipalities from seeking to regulate content.

Finally, municipalities in New York are not permitted to regulate speech pursuant to the N.Y. Public Service Law § 229(2) (Consol. Supp. 2000): "No municipality may prohibit or limit any program . . . in any manner that would tend to encourage or discourage programming of any particular nature, directly or indirectly."

C. *Public policy favors limiting a franchise authority's liability for monetary damages in state law claims such as defamation because aggrieved third parties still have adequate remedies available at law.*

Section 555a neither burdens an individual's right to free speech on a public access channel, nor restricts the ability of third parties to seek lawful redress of actionable claims directly from the private individuals causing the harm. Both declaratory and injunctive relief are sufficient deterrents to abusive conduct by municipalities as regulatory authorities. *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 980. (D.C. Cir. 1996); *Daniels Cablevision*, 835 F. Supp. at 12; *Jones Intercable*, 80 F.3d at 326-27 (*citing Bush v. Lucas*, 462 U.S. 367 (1983)). In fact, prior to the 1992 Cable Act Congress found that claims against municipalities relating to the regulatory activities were posing "a potentially crippling burden" on local governments (S. Rep. No. 92, 102d Cong., 1st sess. 48-50 (1991)) thus the immunity provisions are necessary. Thus the legislative history demonstrates an intent to free franchising authorities to be able to act without fear of reprisals and lawsuits by cable companies. A beneficial corollary effect is that municipalities are insulated from third party claims because such claimants can seek redress in other arenas.

The 1984 Cable Act permits, but does not require, franchising authorities to mandate PEG access as a franchise condition. Municipalities often seek PEG access as a means of opening the airwaves to their citizens. If municipalities will be subjected to defamation actions by third party claimants, municipalities, as the franchising authorities, will be unwilling to seek PEG channels in their franchise agreements and thus Congress's intention to open up the PEG

channels as akin to the proverbial street corner will have been frustrated. Instead, franchising authorities should be protected from state tort claims such as defamation because these PEG channels provide a forum for robust and unrestrained public disclosure.

The Petitioner is also not denied her day in court as she can seek injunctive or declaratory relief from the franchising authority. She is also free to pursue monetary damages directly from the private individual that allegedly engaged in defamation and the intentional or negligent infliction of emotional distress. The presumption that municipalities have "deep pockets" is inappropriate and taxpayers should not have to foot the bill for a cause of action that really belongs between two private individuals.

Finally, the Court need not read an implied remedy into section 555a because this petitioner already has a compensatory remedy available to her. Congress explicitly preserved petitioner's state common law remedy against the programmer through 47 U.S.C. § 558. This section provides that: "Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers . . . pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws . . ." Therefore, Congress has expressly provided petitioner with a compensatory remedy against the cable access programmer alleged to have defamed her.

II. PETITIONER'S COMMON LAW TORT CLAIM FOR DEFAMATION IS PREEMPTED BY THE FEDERAL CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 (CABLE ACT).

Federal law may preempt state common law tort remedies. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311-19 (1981); *Goldstein v. California*, 412 U.S. 546 (1973); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). *See also Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991) (noting that the preemption doctrine applies to common law rules and jury awards of damages). The preemption doctrine is derived from the Supremacy Clause of the United States Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 427 (4 Wheat. 1819). Thus a state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (*citing Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Although there is a judicial presumption against preemption, courts must look for evidence that the preemption was the "unmistakably clear" purpose of Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) ("preemption fundamentally is a question of congressional intent"); *English v. General Elec. Co.*, 469 U.S. 72, 78-79; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (the "ultimate touchstone" of preemption is Congressional Intent)). Congress's intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone*, 505 U.S. at 516 (*citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In the case at bar, Congress explicitly restricted claims against franchising authorities to those seeking injunctive or declaratory relief.

A. *Congress Expressly Preempted State Common Law Damage Remedies in "Unmistakably Clear" Language.*

A preemption clause in the federal statute is the most common indicator of express preemption because a preemption clause clearly demonstrates a congressional intent to preempt. *Medtronic*, 518 U.S. at 471. Thus courts will not need to infer preemption when the statute is clear on its face and contains an express preemption provision. *Cipollone*, 505 U.S. at 517. Based upon statutory construction principles that seek to first determine whether the language used by the legislature has a clear and unambiguous meaning, (*Beecham v. United States*, 511 U.S. 368 (1994)) Congress has clearly expressed its intent to preempt state common law damage actions by using a preemption clause drafted in plain unambiguous language.

The 1992 Cable Act expressly preempts petitioner's state common law tort action for money damages. Congress used the words: "Federal, State or local law" in defining the realm of the preemption clause. 47 U.S.C. § 555a(a). The ordinary meaning of the word "law" includes "common law." Moreover, this court has noted that "state law" includes "common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 517. Thus it is difficult to imagine that this court would need to parse the plain and ordinary words that Congress chose to express its intent to preempt petitioner's damages claims. This court is not being asked to decipher whether Congress intended to preempt state common law damage claims in words like "requirement or prohibition" or "State statute or regulation" as in *Cipollone*. Here, Congress has plainly and expressly said that any other provision of a "Federal, State or local law, shall be limited

to injunctive relief and declaratory relief." 47 U.S.C. § 555a(a). Moreover, Congress provided extra assurances with the enactment of a "rule of construction clause." which notes that

> [n]othing in this section shall be construed as creating or authorizing liability of any kind, under any law, for any action or failure to act relating to cable service or the granting of a franchise by any franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity.

47 U.S.C. § 555a(d).

The plain language of the statute "clearly and unmistakably" preempts petitioner's common law defamation action for damages. Thus the New York State Court of Appeals correctly held that petitioner was preempted from recovering money damages against the Town of Woodstock, the Woodstock Public Access Committee and its members. *Caprotti v. Town of Woodstock*, 94 N.Y.2d 73, 699 N.Y.S.2d 707 (1999).

B. *The Scope of the Preemption Clause Should be Read Broadly.*

A preemption clause also defines the scope and extent of the federal statute's preemption. *Cipollone*, 505 U.S. at 517. Once a statute has an express preemption clause, courts use statutory construction to identify the scope of the preemption to determine the domain preempted. (Betsy J. Grey, Make Congress Speak Clearly: Federal Preemption of State Tort Remedies, 77 B.U. L. Rev. 559, 567-68 (1997)).

Petitioner would have this court narrowly construe the scope of Section 555a to apply only to cable operators (Brief for Petitioner at page 13). The New York Court of Appeals, however, disagreed with petitioner. "By its plain and unconditional terms, § 555a(a) grants a local municipality broad immunity from monetary liability that arises out of 'any' of the municipality's regulatory decisions involving cable television." *Caprotti*, 94 N.Y.2d at 73. Thus, the New York Court of Appeals recognized, as should this court, that Congress clearly intended to insulate municipalities (i.e. taxpayers) from costly money damages in all circumstances arising from the regulation of public access programming.

Moreover, two federal circuit courts have already determined that Section 555a is available to cable access programmers and not just cable operators. *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395 (8th Cir. 1997) (immunizing a municipality from monetary liability in a lawsuit arising out of the municipality's regulatory decision concerning programming content on its public access channel.); *McClellan v. Cablevision of Conn. Inc.*, 149 F.3d 161, 168 (2d Cir. 1998) (holding that actions against local governments regarding the regulation of cable access programming could result only in declaratory or injunctive relief.) Thus, because the jurists who have reviewed the language and scope of Section 555a(a) have been clear in its application, review of this issue is not ripe.

Moreover, not only did Congress expressly and broadly insulate municipalities from money damage claims in the preemption clause (47 U.S.C. § 555a) they choose not to preserve common law damage claims in the savings clause (47 U.S.C. § 556). Thus, if Congress had intended to narrow

the scope of the preemption clause they could have preserved damage claims pursuant to state common law tort actions in a savings clause as they have done in other statutes. *See* Federal Aviation Act of 1958 (FAA), 72 Stat. 731, as amended, 49 U.S.C. App. § 1301, *et seq.*, "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. App. § 1506). Even in the savings clause (codified at 47 U.S.C. § 556(a)) Congress preempted all state laws that are inconsistent with the Cable Act. Section 556 of the Act, provides that "[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provision of [Title VI] (emphasis added)." A state common law tort action for monetary damages would not be consistent with Section 555a(a) which expressly provides that the only remedy against a local government is for injunctive and/or declaratory relief and thus is expressly preempted.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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